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CURRENT TOPICS

The Agriculture Bill

HARD upon the heels of the MINISTER OF HOUSING AND LOCAL GOVERNMENT in his anxiety to translate the Franks Report into action comes the MINISTER OF AGRICULTURE. The Agriculture Bill, which was published last week, proposes substantial restrictions of the functions of the county agricultural executive committees, which have been with us under different names for nearly twenty years. The confusion between the executive and judicial capacities of these bodies has always been unsatisfactory, although in spite of all the rude remarks which have been made about them the committees have done most valuable work. Now the Government intend not only the comparatively minor amendments to meet the Franks Committee's objections but also to sweep away the powers of supervision, direction and dispossession. This wholesale destruction of physical controls is in line with the Government's general policy of relying on economic compulsions. Whether this policy can be successful when many farmers are generously provided with protection against the harsher economic winds is problematical and happily is a question upon which in a legal journal we are not called upon to speculate.

Revision of Rents

WE are pleased to see that rather more guidance is to be given to arbitrators who have to fix agricultural rents, and if the Bill passes the rent properly payable will be " the rent at which the holding might reasonably be expected to be let in the open market by a willing landlord " with vacant possession. The general opinion seems to be that this and some of the other provisions of the Bill will result in rising agricultural rents, and this is not the only way in which the lot of the sitting tenant farmer may become harder. For example, it is proposed to replace s. 25 (1) of the Agricultural Holdings Act, 1948, by a new subsection which appears to be more favourable to the landlord. Presumably the Minister of Agriculture believes that if tenant farmers are no longer to be chastised by the whips of the county committees they must be more vulnerable to the scorpions of their landlords. On the other hand, it is proposed to borrow from the Rent Acts the overriding requirement that it should be fair and reasonable for a landlord to insist on possession even if one of the statutory grounds for recovering possession is proved. The initial duty of deciding on the operation of notices to quit is to be transferred to the Agricultural Land Tribunals, which will then be vested with many wide discretionary powers: it will thus become correspondingly more difficult for solicitors to advise their clients. We hope to publish an analysis of the new Bill at a very early date.

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Decontrol: Antedating New Tenancy

ON 3rd March the member for a London constituency mentioned in the House of Commons that solicitors had sent one of her constituents, tenant of decontrolled premises, a lease providing for payment of an increased rent from 6th July, 1957 (the date of decontrol), and next day addressed a question to the Minister of Housing asking whether he was aware of such backdating, and was it legal. The MINISTER, correctly disclaiming authority to interpret the law, replied that he had been advised that a lease purporting to commence "before the date on which its terms were in fact agreed," "though valid in other respects," would not be a tenancy for the purpose of para. 4 of Sched. IV to the Rent Act, 1957, and could not therefore have the effect of breaking the standstill period. Except for the words between inverted commas, we consider this a fair statement of the law as reviewed and stated by Clauson, J., in *Cadogan* (*Earl*) v. *Guinness* [1936] Ch. 515; it is a very common experience that in the creation of leasehold interests the term is expressed to run as from a date anterior to the date of the document which creates the term; but a term created by a deed in 1936 to begin as from 25th December, 1900, for seventy years would not be a term of seventy years. And the paragraph excluding the standstill period uses the expression "agree for the creation." In other words, antedating affects computation only. But we think that the Minister was on less solid ground when he went on to suggest, not only that a landlord could not recover under such a lease any increase in rent before 6th October, 1958, but that the tenant would have the benefit of the lease when the statutory protection had come to an end on that date. The point that a tenant cannot simultaneously "retain possession" by virtue of Sched. IV, para. 2, and enjoy possession by virtue of an agreed tenancy seems a sound one; but whether an attempt to produce such a state of affairs could partly succeed and partly fail must depend on such factors as the wording of the particular agreement.

Out-of-date Fines

WE hardly like to mention inflation for the third successive week. Changes in pecuniary limits in statutes usually follow a long time after the changes in monetary values which are their cause. The maximum limits for the county court jurisdiction and for hire-purchase transactions within the Hire-Purchase Act, 1938, and the salaries of the judges, to mention some recent changes, were all overdue for revision when they were increased. The time is now ripe, one gathers from the second reading on 7th March of the Metropolitan Police Act, 1839 (Amendment) Bill, to consider fines, and especially fines for those offences which themselves have recently shown an inflationary trend in numbers. Offences of using threatening, insulting or abusive words or behaviour in a thoroughfare or public place have increased by 32 per cent. in the last three years, and convicted offenders have been getting away with fines of £2 or less, which were adequate in 1839 but are not to-day. The Bill proposes to raise the maximum fine for this offence from £2 to £10. We suggest that this might be a convenient opportunity to unify the law on this subject over the whole country. It is not really satisfactory to have minor variations in different places, but we think that more use could be made of s. 5 of the Public Order Act, 1936.

Legal Education

THE PRESIDENT OF THE LAW SOCIETY recently gave the students of the Society's School of Law a short preview of the Council's ideas for changing the basis of training for the profession. After mentioning the guidance which the Council has given about salaries and its non-committal attitude on premiums, he went on to say that there may emerge a Final Examination in two parts, which would make it less of a memory test. This encouraging information follows the hint which the President dropped at Harrogate last September. The real difficulty is that the fairer an examination becomes to the candidate the more difficult it becomes for the examiner to mark. Fortunately, no one has yet suggested that final or even intermediate students should be subject to a "yes," "no" or "tick in the right square" type of examination: the trend is all the other way and we hope that it continues like that.

Subsequent Discovery of Adultery

THERE have been two recent cases in which an order in a matrimonial cause has been discharged or varied because the party against whom the award was made had subsequently discovered that the party who obtained an advantage by the order had committed adultery before the date of the award. In *Newman* v. *Newman* (1958), 122 J.P. 42, LORD MERRIMAN, P., held that where a husband against whom an order had been made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, discovered that his wife had committed adultery before the date of the order, he could apply for the order to be discharged under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground that the adultery, which was disclosed when the wife sought the discretion of the court when she petitioned for divorce and of which the husband had no previous knowledge, constituted "fresh evidence" within the meaning of that section. In *Johnson* v. *Johnson* [1900] P. 19, Sir Gorell Barnes, P., held that "fresh evidence" was evidence which had come to the knowledge of the party applying since the hearing and which could not reasonably have come to his knowledge before that time, and Lord Merriman, P., had little hesitation in deciding that the wife's adultery in the case which was before him came within this definition. The second case, *Kingston* v. *Kingston* (*Gilder cited*) [1958] 2 W.L.R. 310; *ante*, p. 123, was an appeal by a party cited against an order to pay the husband's costs. Two months after the decree had been made absolute the former wife discovered that her former husband had committed adultery before the hearing of the petition, a fact which he had concealed from the court. The husband relied upon s. 31 (1) (*e*) of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that there shall be no appeal "from any order absolute for the dissolution or nullity of marriage in favour of any party who having had

time and opportunity to appeal from the decree *nisi* on which the order was founded, has not appealed from that decree." The Court of Appeal were unable to accept the argument that the husband was protected by this section as they could not accede to the view that this case was really an appeal from a decree absolute into which the order for costs had merged. The order for costs was distinct from the decree of dissolution, and even if it had not been, HODSON and PEARCE, L.JJ., appear to have been of the opinion that the party cited had not had " time and opportunity " to appeal against the decree until the fact of the husband's adultery had come to light. Their lordships varied the order for costs by providing that each party should bear his own.

A Run for His Money

MR. JOSEPH WRIGHT, a huntsman, has recently had the experience (which, we imagine, was as disturbing for him as for a fox to hear the gentleman in question in full cry) of being pursued by an inspector of taxes. It appears that Mr. Wright was run to ground and the inspector closed in successfully for the " kill." The huntsman appealed against a decision of the Special Commissioners of Income Tax that gifts of money paid to him at Christmas-time by members and followers of the hunt were liable to tax. The all-important question was whether these gifts should be regarded as Christmas presents from friends or part of Mr. Wright's remuneration as a huntsman. The appeal came before VAISEY, J., under the title of *Wright* v. *Boyce* (*Inspector of Taxes*) (1958), *The Times*, 7th and 8th March. With regret, his lordship felt bound to dismiss the huntsman's appeal and apply the principles enunciated by the Court of Appeal in *Moorhouse* v. *Dooland* [1955] Ch. 284. Vaisey, J., reminded the court that the parson had to pay tax on his Easter offering, the taxi driver and waiter on his tips and the cricketer on collections taken on his behalf in return for meritorious performances, although not on his benefit.

Mr. Hugh Willatt

WE congratulate Mr. HUGH WILLATT, who practises in Nottingham, on his appointment as a member of the Arts Council. Mr. Willatt is vice-chairman of the Nottingham Theatre Trust and chairman of the Executive Committee of the Nottingham Playhouse. Although we have a vested interest by virtue of geography in the continued prosperity of the London theatre, we hope that Mr. Willatt will use his influence to revive the theatre in provincial towns, in many of which it is dead or so nearly dead that its breath is imperceptible. That it is alive in Nottingham is due to Mr. Willatt and his colleagues, and we are very pleased that a member of our profession should now be given the opportunity of extending his activities.

The Wolfenden Report

THE breadth and depth of opinion represented by the signatories to a letter in *The Times* last week asking the Government to introduce legislation to implement the Wolfenden Report is remarkable. The Government are taking no action on the ground that public opinion is divided. While we sympathise with ministers in their reluctance to add to their burdens, we think it right to draw a distinction between informed and uninformed public opinion. As the signatories to the letter emphasise, the case for reform has already been accepted, not only by the majority of the Wolfenden Committee, but also by most of the responsible papers and journals, by the two Archbishops, the Church Assembly, a Roman Catholic committee, a number of nonconformist spokesmen and many other organs of informed public opinion. We hope that the letter will persuade the Government to have second thoughts.

Mental Illness and Detention

" THE law is the final guardian and protector of our liberties " said the HOME SECRETARY on 6th March. He was speaking at a conference organised by the National Association for Mental Health, and he told the conference that legislation may be introduced during the next Parliamentary session to give effect to many of the proposals of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency. It seemed axiomatic, he said, that when the law allowed compulsory detention, it must be made clear beyond a peradventure who could be liable to such detention. In parting company with the commission's view that it would be both difficult and unnecessary to define medical conditions in legal terms he made the statement quoted above, and invited the delegates' views on the description of groups who could be subjected to compulsory powers of detention. The problem, Mr. Butler said, would have to be decided in the next few months. The important thing was to find terms that would carry a clear meaning to doctors, and he did not doubt that a satisfactory answer would be found. We agree entirely with Mr. Butler. It is true that it is difficult to define physical and mental conditions in exact and objective terms, but where personal liberty is involved it is essential to try.

"THE SOLICITORS' JOURNAL," 13th MARCH, 1858

ON the 13th March, 1858, THE SOLICITORS' JOURNAL discussed costs in criminal cases: " Prosecutors and witnesses in criminal cases are already in the enjoyment of the allowances ordained by the late Home Secretary for their expenses, trouble and loss of time. Counsel and attorneys may expect to be the next victims . . . The scale of allowances promulgated by Sir George Grey can only be defended as an extensive application of the principle that gratuitous service is due to the State from such of its citizens as caprice or chance may select to bear on their individual shoulders the burden of the whole community. This principle is undoubtedly a very ancient one; and if antiquity be an excuse for barbarism, the Home Office will have no difficulty in producing an abundance of decisive precedents . . . Now, the law of England . . . is redolent of immemorial antiquity; and it is natural therefore that it should cherish many practices abhorrent to the social economy which is the growth of a younger time. Lord Campbell lately, in strict conformity with the law, awarded to a special jury the sum of one guinea each per day in payment for their services in a most tedious and complicated investigation. The same distinguished judge occasionally lectures sheriffs on a want of splendour and profusion in the arrangements for his reception at the assizes. Country gentlemen . . . complain that they should be impoverished for the sake of impressing upon rustics a proper sense of the dignity of the law . . . To suffer for their country's good will now be equally the lot of sheriffs, juries, counsel, attorneys, prosecutors and witnesses. Of all the multitude that gathers to an assize town, nobody will have a chance of justice except the prisoners. . . . Social science has done much to conquer fate, but the law, or at least its administrators, . . . regard the attempt as impious."

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EUROPEAN COMMON MARKET

CONFLICT of laws has always been somewhat dicey (will such a terrible pun get by?) and now it seems that, as regards dealings with Europe, the situation may have worsened. For under the provisions of the Treaty establishing the European Economic Community entered into at Rome on 25th March, 1957, which came into force at the beginning of this year, there are some provisions for declaring null and void contracts affecting competition; this Treaty is made between Belgium, Germany, France, Italy, Luxembourg and the Netherlands.

Not for the sake of a mere pun was it suggested that the position was liable to be affected by chance: for what we find is a number of provisions drawn in rather wide terms, followed by exceptions of such a general character that the whole rule seems at the moment to be placed in a no man's land.

Thus agreements, decisions, and concerted practices likely to affect trade between the member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market are prohibited. This rule, it will be noted, speaks of the effect on trade between the member States, but conceivably an arrangement by one State with a State outside the Common Market might " distort " competition if it did not at least " restrict " it. It is also specifically stated that the following are prohibited: fixing of prices or terms of trade; quotas affecting production, markets, technical development or investment; market sharing or sharing sources of supply; imposing unequal terms for equivalent supplies; and demanding the taking of additional supplies of goods unconnected with the main contract (art. 85–1). What is not clear is whether these are absolutely prohibited or merely presumed to affect trade between member States: if the latter interpretation is correct then evidence in rebuttal would (if available) be admissible. Article 87 (2) even goes so far as to provide for fines and penalties, but this provision will not operate until further steps have been taken by the Council.

Yet under art. 85–3 it is laid down that the above provisions may be declared inapplicable to agreements, decisions and concerted practices which contribute to the improvement of production or distribution of goods or to the promotion of technical or economic progress (while reserving to users an " equitable share " in the profit) provided that they (*a*) neither impose restrictions not indispensable to the attainment of these objectives; nor (*b*) enable such enterprises to eliminate competition " in respect of a substantial proportion " of the goods concerned. Somewhat similar provisions are laid down in art. 86, where any action by a person who has a " dominant position " in the market seeking to take unfair advantage of it is prohibited.

Probably clauses of this type seem much too vague to an English lawyer simply because we have never accepted codification of the law: if we had we should be more used to this type of draftsmanship; certainly unless one has such general provisions a code would be quite impractical. How then will these provisions work in practice?

In the first place they will be worked by the municipal courts of the member States. This is specially provided for by art. 88, which empowers such courts to rule upon the admissibility of any understanding and upon any improper advantage taken of a dominant position in the Common Market. The intention is that within three years the Council of O.E.E.C. will on a *unanimous vote* lay down directives on these matters. If they cannot get such a vote within that time a majority vote will be accepted.

In English law such a treaty would have no effect on our courts until some statute had been passed. But this is not so in all countries. Oppenheim in his " International Law," vol. I, para. 520, puts the position thus: " The binding force of a treaty concerns in principle the contracting States only, and not their subjects . . . This rule can, as has been pointed out by the Permanent Court of International Justice, be altered by the express or implied terms of the treaty, in which case its provisions become self-executory. Otherwise . . . States must take such steps as are necessary according to their municipal law to make these provisions binding upon their subjects, courts, officials and the like. It may be that . . . the official publication of a treaty concluded by the Government is sufficient for this purpose . . ."

The wording of this treaty is such, and the nature of these particular provisions are such as to make it appear that they are to bind the courts of the member States straightaway.

English equivalents

Translating these articles into the English idiom, they seem to amount to little more than our rules concerning restraint of trade: we cannot speak of our rules concerning restrictive trade practices because until the Restrictive Practices Court has given a number of decisions we do not know what will be the tone of the law. There is, of course, the Restrictive Trade Practices Act, 1956, s. 21, stating what is presumed to be against the public interest, and that is characteristically more specific and hence more narrow than the corresponding provisions of the continental draftsman. But the Restrictive Trade Practices Act will not normally apply in this type of case because of s. 8 (8). So far as previous decisions of English law are concerned we know that although the public interest is an element in deciding what is in undue restraint of trade it has never played a prominent part and, it seems, never applied until the recent case of *Kolok Manufacturing Co., Ltd.* v. *Kores Manufacturing Co., Ltd.* [1957] 1 W.L.R. 1012. Only rarely have cartel agreements come before the courts and on the whole they have fared well, mainly by ignoring the real issue! *Mogul S.S. Co.* v. *McGregor, Gow & Co.* [1892] A.C. 25 is a classic case on the situation where one party has a " dominant position " in the market. On the civil side *Thorne* v. *Motor Trade Association* [1937] A.C. 797, if anything, gave a fillip to trade associations and stop lists. We can exclude the recent *Austin Motor-Car Co., Ltd.'s* case, and in *English Hop Growers* v. *Dering* [1928] 2 K.B. 174, the point was evaded. Notwithstanding that contracts of this nature are common, one is tempted to say that probably agreements of this character are not normally taken to law. Usually such contracts arise out of a trade association, and as often as not there are one or two " outsiders " who will not toe the line. If existing members break away and cease to abide by the rules it is not usual to endeavour to put the law on their heels. This was done in *English Hop Growers* v. *Dering*, but there there was no plea of illegality on account of undue restraint of trade.

We are, however, entering a phase where restrictive practices are under intense study—more so than formerly outside America. It may be that more pleas of illegality will be

set up, and if they occur between a national of this country and a national in O.E.E.C. the Treaty mentioned above may be invoked. It is, however, anyone's guess how the main provisions and the exceptions will be interpreted. The ultimate result may well be a strengthening of the more innocuous cartel arrangement.

The treaty empowers the municipal courts to rule upon the provisions. If the action is brought abroad, and particularly if the contract is deemed to be governed by the law of one of the member States, the plea that the contract is null and void is certainly " on the cards " but as stated above the exceptions are wide.

Hearing in England

Suppose the contract is governed by English law and the action (or arbitration) is heard in England? We must distinguish two different points in dealing with this situation. The first is whether the English courts will recognise the applicability of the foreign law: the general rule is, of course, that since English law by hypothesis applies the foreign law does not and the illegality arising from the treaty may be ignored. But there are exceptions, one of which is that English law will not enforce a right which involves interference with the authority of a foreign State within the limits of its territory, and if the contract was to be performed in part in the European country it may be that we should have to recognise the provisions of the treaty and refuse to give judgment in favour of the contract, always supposing it is not void under our own law as being in undue restraint of trade. The House of Lords recently accepted a wide interpretation of the rule regarding the laws of foreign States which would be recognised in this country so as to limit what judgment our courts will give in *Regazzoni* v. *K. C. Sethia* (1944), *Ltd.* [1957] 3 W.L.R. 752.

The second point is that even if judgment were given against a foreign national of one of the European countries it could not apparently be enforced. For this rule we will, having started this article by mentioning " dicey," turn now to Dicey proper: " 53. The extra-territorial effect (if any) of an English judgment is a matter of foreign law."

In those circumstances it would be important to endeavour to show that the contract is within the saving provisions of art. 85. If judgment was obtained in England one could then invoke the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933. But even this facility is uncertain in operation, assuming the foreign country has provisions similar to our s. 4, under which application may be made to set aside the judgment on various grounds.

I think the pun was most appropriate.

L. W. M.

NOTES ON FORMING A COMPANY—I

THE object of this and the succeeding articles is to attempt a brief explanation of some of the elementary principles of company law and practice which arise on, and immediately after, the formation of a company. The articles are not intended for specialists or for experts, nor are they intended to be " clever." The aim is to show that the formation of a company limited by shares is not difficult, and to provide some guide for the general practitioner who is only occasionally asked to act in such a matter and who, when so asked, might feel tempted to pass the work to an accountant or to a specialist firm of solicitors.

Whilst specialised assistance may be essential in unusual or difficult cases the majority of company formations are quite straightforward, and can easily be handled in ordinary offices. It is with such formations that the present articles are concerned. The only equipment needed is a book of precedents (many law stationers in fact will supply " ready made " sets of memoranda and articles) and a copy of the Companies Act, 1948.

Section 1 of the Companies Act, 1948 (all subsequent references will be to this Act, unless otherwise indicated), deals with the mode of forming an incorporated company, and subs. (2) classifies companies as companies limited by shares, companies limited by guarantee and unlimited companies. The latter two need not concern the general practitioner, and these articles will deal only with companies limited by shares, which, in fact, constitute the vast majority of all formations. The discussion will also be confined to private companies, which are defined by s. 28 as companies which include certain restrictions in their articles: a point to be considered more fully later on.

It is interesting to remember that the very common expression in general use, " public company," is not used in the Companies Act. The expression is normally taken to mean a company that is not a private company within s. 28 because its articles do not contain the appropriate restrictions, and the expression will be used in that sense in the present context. Remember also that size is no guide at all: some private companies may have a capital or assets of a million pounds or more, whereas some public companies may have a capital of a few hundreds. Similarly, whether or not a company is to have its shares quoted on a stock exchange only has an indirect bearing on its status: in fact, it will have to be a public company because, in practice, a quotation will not be granted whilst the restrictions imposed by s. 28 remain in the articles.

The reasons for confining the present discussion to private companies are two-fold. First, the majority of formations are of private companies which intend to continue in being as such to run family businesses, or to perform similar functions and, second, practically, if not exclusively, all modern formations are initially of private companies. If it is intended to promote a public company the simpler procedure is to form a private company and to convert it into a public company soon afterwards by altering its articles. This procedure avoids certain cumbrous, and not very useful, provisions of the Act, such as those regarding the statutory meeting (s. 130) and the need to obtain a certificate to commence business (s. 109).

It will thus be seen that by cutting out a lot of dead wood what at first sight appears to be a complicated problem can be reduced to the formation of a private company limited by shares: in practice by far the most common case. It is formed by the preparation of a few simple documents, lodging them with the registrar and the payment of the appropriate fees.

Taking instructions

Instructions will come in various ways but, in practice, will boil down to one of two alternatives. The client will

either wish to form a company to embark on some brand new project, for example, a property company formed to develop a particular estate of new houses, or the client already having an established business now wishes to convert that business into a private company or, more technically, to form a private company to acquire and to continue the business. The distinction involves the question of whether the shares in the company are to be issued for cash or for some consideration other than cash. In the latter case if the whole or part of the purchase price is to be met by the allotment to the vendor of fully paid, or partly paid, shares in the company it will be necessary for a formal agreement for the sale of the business to be prepared. The reason for this is that in the case of shares allotted as fully paid or partly paid otherwise than for cash a duly stamped contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, and a return stating the number and nominal amount of the shares so allotted, the amount paid up and the consideration therefor must be delivered to the registrar as part of the return of allotments (s. 52 (1) (*b*)).

The other matters upon which instructions will be necessary will be the contents of the memorandum and the articles of association. The memorandum is, in effect, the charter of the company, containing its name, its country of domicile, its objects and details of its share capital. It is the document which principally governs the relationship of the company with other people, defining, as it does, its constitution and powers. The articles are regulations governing the internal management of the company and the relationship between a member of the company and other members in matters of membership. The articles deal with such matters as meetings, directors and management. Frequently, in a private company, there are detailed provisions governing the transfer of shares and conferring a right of pre-emption on the other members of the company.

Most of these points will be considered in detail in later articles.

H. N. B.

DESERTED WIVES AGAIN

ANOTHER attempt has been made to extend the privileged and anomalous position of the deserted wife, but it has not been successful.

The matter recently came before His Honour Judge Reginald Clarke, Q.C., in the Clerkenwell County Court. The plaintiffs had obtained judgment against the defendant for between £20 and £30. The defendant failed to satisfy the judgment, and the plaintiffs levied execution. The bailiff of the court was directed to seize the goods at the defendant's address. He was met by a claim by the defendant's wife to be the owner of all the goods. The plaintiffs were unwilling to admit the claim. Accordingly, the matter came before the learned judge on an interpleader summons.

When the case came before the court the claimant gave evidence that her husband had left her. (It was assumed, though perhaps precariously, that this amounted to evidence on which the court might find that she was a deserted wife.) The claimant stated that she purchased the goods in question (other than wedding presents) by taking the money to pay for them from her purse which at all material times contained her own earnings and money given to her by her husband for housekeeping.

On this evidence the execution creditors' argument involved the following propositions :—

1. The housekeeping money was the husband's and not the wife's.

2. In the absence of other evidence, the interests of the parties should be taken to be equal (*Cobb* v. *Cobb* [1955] 1 W.L.R. 731).

3. Where goods are owned jointly by the execution debtor and a third party they are liable to be seized and sold in execution provided that one-half of the proceeds of sale (free of costs) is reserved for the third party (Annual Practice, 1958, at p. 1055). These propositions were accepted by the claimant's counsel and the judge made findings of fact accordingly.

The claimant's argument was that a deserted wife was in a different position from any other joint debtor. This argument was formulated as follows :—

(*a*) Furniture is a part of the "matrimonial home" as much as the building in which it is housed.

(*b*) When a wife is deserted the matrimonial home is subjected to a clog or fetter in order to preserve her interests (*Bendall* v. *McWhirter* [1952] 2 Q.B. 466).

(*c*) A deserting husband cannot sue his wife to recover any part of the matrimonial home, but must apply to the court for a discretionary order under s. 17 of the Married Women's Property Act, 1882 (*Bramwell* v. *Bramwell* [1942] 1 K.B. 370).

(*d*) The bailiff in execution stands (like a trustee in bankruptcy) in no better position than the husband.

(*e*) Accordingly, the bailiff cannot sell the goods.

The answer of the advocate for the execution creditors ran as follows :—

(i) It is true that the husband has no right to sell the goods which comprise the matrimonial home, but this is the position of any joint owner who has no right to sell the goods without the approval of his co-owner. The question is not one of rights but of powers. A co-owner can effectually (i.e., so as to pass a good title to the purchaser) sell the goods which are jointly owned and a husband can do likewise (*Thompson* v. *Earthy* [1951] 2 K.B. 596).

(ii) A co-owner can intervene by obtaining an injunction to prevent a sale by the other co-owner in breach of trust or in breach of contract. A deserted wife can do similarly (*Lee* v. *Lee* [1952] 2 Q.B. 489). But if a sale in fact takes place or if goods are taken in execution neither the co-owner nor the wife can impeach the transaction (compare *Westminster Bank, Ltd.* v. *Lee* [1956] Ch. 7).

The learned judge's decision was clear and to the point. "I am not prepared," he said, "to hold that the claimant's position as regards these items of furniture is any different from that of any other third person who might be jointly entitled with the execution debtor." Accordingly, the claim failed and execution was ordered to proceed, but with a proviso to the effect that one-half of the proceeds of sale should be refunded to the claimant and that all the costs

of the execution should be paid out of the other half of the proceeds of sale.

The writer regards this as a welcome decision. In the first place, it is very necessary to place some bounds to the privileges of a deserted wife. In the second place, it would be somewhat difficult to explain to the uninitiated layman how it could be that the jointly owned contents of the matrimonial home could be taken in execution whilst the spouses were living together but could not be taken in execution if the husband decided to go away.

M. S. G.

EXTRATERRITORIAL CRIME

As a general rule, crimes are punishable only where they are committed. If an Englishman steals in Paris, it is a matter for the French. Should no proceedings be taken against him in France, nothing will be done in respect of the offence in this country, even though he should take the unlikely course of going along to his local police station and making a full confession. The French could ask for his extradition, of course, if the English police sent the confession to Paris.

To this general rule there are a number of exceptions, made in most cases on the ground of public policy and the desirability of preserving as high a degree of international probity as possible. The most important are homicide, piracy, treason and misprision of treason, offences against the Ballot Act, 1872, the Corrupt Practices Act, 1883, and the Official Secrets Acts, 1911 to 1920.

For many years there was a doubt as to whether a person in England could conspire to commit a crime which was to be committed abroad. Kenny, in his "Outlines of the Criminal Law," gives an example of this problem when various persons had conspired in London to assist Orsini in his plot to assassinate Napoleon III in Paris. The Emperor escaped unhurt but ten persons were killed. Since then conspiracy or incitement in this country to commit murder abroad has been made indictable by the Offences against the Person Act, 1861, s. 4. In *R.* v. *Antonelli and Barberi* (1905), 70 J.P. 4, an indictment which charged a person with encouraging persons unknown to murder sovereigns and rulers of Europe was held good, as a sufficiently well-defined class was referred to.

Recently, the subject of the extraterritoriality of crime has been the subject of prolonged consideration not only by the Court of Criminal Appeal but also by the House of Lords in the case of *Board of Trade* v. *Owen and Seth Smith* (1956), 120 J.P. 553; [1957] 2 W.L.R. 351.

Here the respondents were convicted on an indictment charging them with a conspiracy in London to defraud an export control department known as Z.A.K., of the Federal Republic of Germany, by causing Z.A.K. to grant licences to export certain metals from Germany by fraudulently representing to Z.A.K. that the metals would be supplied to and consumed by Irish manufacturers, the respondents well knowing that they were to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R.

The Court of Criminal Appeal quashed the conviction on one count but upheld it on two others. The judges held that "it was open to the jury to infer that each letter with its enclosed forged document was sent by post from England to Germany and the posting of a letter containing a forged document constituted an uttering of the document within the meaning of s. 6 (2) of the Forgery Act, 1913, and, therefore, there was evidence to show that the object of the conspiracy was carried out in London. It was sufficient to show that the object of the conspiracy might have been carried out in England." In the case of the quashed conviction, the court held that here "the conspiracy to defraud, though formed in England, was to be carried out in Germany and the persons intended to be defrauded were Germans in Germany. No offence therefore was committed for which the appellants could be indicted in England and the conviction must be quashed." Unless such a conspiracy is made an offence by Act of Parliament, as in the case of conspiracy to murder, no proceedings can be taken in England.

Against the quashing of the conviction for conspiracy the Board of Trade appealed to the House of Lords. Counsel for the respondents said that the Crown's argument amounted to asking the House to extend the law of conspiracy. If the Crown was right, then people in this country who combined to get persons out of some foreign country by means of forged papers, for example, refugees from Germany between 1932 and 1939, would be guilty of an indictable conspiracy. It was not fanciful to say that a similar situation might arise in the world now. It was not satisfactory to dismiss the problem saying that no one would think of indicting such persons.

The Crown's argument, said counsel, would not allow the Romans in Rome to do as the Romans did. Certain acts which were criminal here were not criminal abroad, as, for example, homosexuality, gaming and cock fighting. On the argument of the Crown, if two Frenchmen resident in England conspired to go to Paris to commit an act of homosexuality, they would be guilty of an indictable conspiracy.

In dismissing the appeal of the Board of Trade, the House of Lords held that a conspiracy to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie here for conspiracy and is recognised as an offence in order to prevent the commission of the substantive offence before it reaches even the stage of an attempt and to aid in the preservation of the Queen's peace within the realm, with which, generally speaking, the criminal law is alone concerned; and accordingly, a conspiracy of the nature here charged (which was a conspiracy to attain a lawful object by unlawful means, rather than to commit a crime) was not triable here, since the unlawful means and the ultimate object were both outside the jurisdiction.

Lord Tucker, who delivered the judgment, concluded with these words:—

> "Sir William Holdsworth wrote: 'Moreover at all periods of our history it has been far more difficult to extend the criminal law by a process of judicial decision than any other branch of the law. There has always been a wholesome dread of enlarging its boundaries by anything short of an Act of the Legislature.' No one has ever been convicted of such a conspiracy and if it is in the public interest that such conspiracies should be triable and punishable here, it is, I think, for the Legislature so to determine. The comity of nations can hardly require the acceptance of the Crown's contentions in the present case, having regard to the non-recognition of conspiracy as a crime in Germany. Moreover, in the field of criminal law the comity of nations can best be served by treaties of extradition."

F. T. G.

ESTOPPEL BY RECITAL OF SEISIN

THE decision of Danckwerts, J., in *District Bank, Ltd.* v. *Webb* [1958] 1 W.L.R. 148; *ante*, p. 107, will surprise conveyancers. By a conveyance dated 22nd February, 1952, a freehold house was conveyed to George Edward Webb (hereinafter called "George") and his wife in fee simple. By a lease dated 25th March, 1952, George and his wife demised the house for twenty-one years at the rent of £70 a year to George and Donald Martin, who afterwards became the partner of George. Later, the partnership was dissolved and Martin claimed no beneficial interest in the lease. It does not appear that Martin released his legal estate in the term to George. But thenceforward George and his wife or one of them were in exclusive possession of the house.

On 28th July, 1954, George and his wife executed a memorandum of deposit to secure Mrs. Webb's bank account. The charge was still subsisting, but the bank was not a party to the summons.

On 8th November, 1954, George and his wife conveyed the house to George Edwin Webb (hereinafter called "Edwin") in fee simple for £4,200. The conveyance recited that the vendors were "seised in unencumbered fee simple in possession upon trust for sale"; but no mention was made of the lease either by recital or in the habendum.

On 7th July, 1955, Edwin by a legal charge charged the house in favour of the plaintiffs (who were bankers) to secure his account. No mention was made of the lease; but George and his wife remained in possession.

Edwin having failed to pay the money secured by the legal charge, the plaintiffs claimed possession. George and his wife resisted the claim, relying on the lease dated 25th March, 1952. The plaintiffs contended that George and his wife were estopped from relying on the lease by the recital in the conveyance to Edwin.

No estoppel

Danckwerts, J., upheld the claim by George and his wife on the ground that the recital did not constitute a sufficiently unambiguous representation to create an estoppel: a lease or tenancy might be an incumbrance, but an incumbrance was normally in the nature of a mortgage and not in the nature of a lease. And "fee simple in possession" distinguished such an estate from "fee simple in reversion" and did not mean vacant possession. The plaintiffs knew that George and his wife were still in possession and should have inquired as to their title; but his lordship did not rely on that ground for his decision.

A recital that the vendor is seised in fee simple in possession free from incumbrances is the common form which has been in use for many years, with the object of creating an estoppel against all outstanding interests (see Encyclopedia of Forms and Precedents, 3rd ed., vol. 14, p. 306), and the writer is not aware of any precedent of a recital expressly negativing the existence of a lease. It is stated in Williams, Vendor and Purchaser, 4th ed., vol. 1, p. 201: "It is apprehended that when land is sold under a contract expressly or impliedly promising to convey the fee simple, free from incumbrances, it is *prima facie* a term of the contract that the purchaser shall on completion be put into actual (and not constructive) possession." And in *Ingle* v. *Vaughan Jenkins* [1900] 2 Ch. 368, Farwell, J., held that for the purposes of merger there was no distinction between a beneficial lease and a term to secure a charge. "In either case the term is taken as an equivalent for money expended." This view is in accordance with Chambers' Dictionary, which defines "encumbrance" as meaning "a legal claim on an estate."

As regards the meaning of "in possession," under the Law of Property Act, 1925, there can be no legal estate in fee simple in reversion, except where the reversion is expectant on a lease, and throughout the Act the interest of an estate owner who grants a lease is called a reversion. (See ss. 5 and 139 *et seq.*) In *Hughes* v. *Jones* (1861), 3 De G. F. & J. 307, Turner, L.J., held that a vendor who purported to sell an estate in fee simple in possession had to prove a title free from leases. And in *Bolton* v. *London School Board* (1878), 7 Ch. D. 766, Malins, V.-C., held that a recital that the vendor was seised in fee simple in possession "is a statement of fact that he was not only in possession, but he was in possession in fee simple" of the land.

But whatever may be the meaning of "unencumbered fee simple in possession," it is clear that George and his wife were not estopped by the recital, for this reason: There can be no estoppel by recital when the recital is true (see *per* Sir G. Jessel, M.R., in *General Finance, Mortgage and Discount Co.* v. *Liberator, etc., Building Society* (1878), 10 Ch. D. 15), and, as will now be shown, the recital was true, George and his wife being able to convey or to direct the conveyance of the house to Edwin free from the lease.

A true recital

The position immediately before the conveyance to Edwin was as follows. George was the sole beneficial owner of the lease, but could not keep the term alive against Edwin (see *Otter* v. *Lord Vaux* (1856), 6 De G. M. & G. 638, and *Ingle* v. *Vaughan Jenkins, supra*). The legal estate in the term was vested in George and Martin, the latter being bound to assign his legal estate as George might direct, and Edwin was bound to accept a title so made. (See *Re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218.) George and his wife, being absolute owners of the reversion in fee simple, could agree to merge the lease. If they did so, the term became a satisfied term and ceased. (See s. 5 of the Law of Property Act, 1925.) The fact that the lease was of no use to George and was not mentioned in the conveyance to Edwin is, it is submitted, strong evidence that George and his wife did regard the term as being merged. If, however, there was no merger before the conveyance, then the reversion in fee simple would pass to Edwin, as also would the entire beneficial interest in the term under the all estate clause (see s. 63 of the Law of Property Act, 1925, and *Thellusson* v. *Liddard* [1900] 2 Ch. 635, 641). The term would then cease as a satisfied term.

George and his wife by remaining in possession became tenants on sufferance, although by payment of rent they might acquire a new tenancy. But they gave no evidence as to the terms of their tenancy and must, therefore, it is submitted, be presumed to have remained tenants on sufferance, and the plaintiffs were entitled to an order for possession. The equitable mortgage dated 28th July, 1954, if it was binding on the plaintiffs, would not affect their right to possession.

Form of recital

Conveyancers should consider whether the form of recital requires alteration. The writer tentatively suggests that the form might be altered to read: "Whereas the vendor is seised in fee simple in possession of the property hereinafter described free from all other estates, interests or charges which

are capable of subsisting or of being conveyed or created at law [except as hereinafter mentioned] and [except as aforesaid] free from all equitable interests, and has agreed to sell the same to the purchaser for the like estate in possession (free as aforesaid) at the price of £ ." Any legal estate subsequently acquired by the vendor would then pass to the purchaser by virtue of the estoppel without a conveyance, and the court could order the vendor to convey any equitable interest so acquired. (See *Smith* v. *Osborne* (1857), 6 H.L. Cas. 375.) But it is dangerous to alter a common form without careful consideration and the writer would welcome criticism or suggestions.

L. H. ELPHINSTONE.

Landlord and Tenant Notebook

EFFECTS OF ILLEGALITY

THE decision in *Grace Rymer Investments, Ltd.* v. *Waite* [1958] 2 W.L.R. 200; *ante*, p. 86, has, as far as the matter of priorities is concerned, been fully discussed in "A Conveyancer's Diary", *ante*, p. 132, and the questions of entry and overriding interests do not concern the Landlord and Tenant Notebook. But the way in which one point was disposed of is, perhaps, worth considering in connection with the effects of illegality or fraud tainting some landlord-and-tenant transactions. For the mortgagees-plaintiffs, having failed to destroy tenancies granted by the mortgagors by invoking the Land Registration Act, sought to recover possession on the ground that those tenancies were void because granted in consideration of illegal premiums. They established that payments made were premiums, but not that the tenancies were void. What is important for present purposes is that, in order to succeed, they would have had to satisfy the court that the tenancies *were* void, which is another way of saying that they had never existed.

For most of the best-known cases illustrating illegality deal with attempts to enforce the provisions of a lease or tenancy agreement alleged to have been tainted. In *Girardy* v. *Richardson* (1793), 1 Esp. 13, the action was for use and occupation; the defendant had told the plaintiff's wife that she was taking the room for the purpose of prostitution and the claim was dismissed by reference to the *contra bonos mores* principle. In *Gas Light and Coke Co.* v. *Turner* (1840), 6 Bing. (N.C.) 324, the plaintiffs had let premises for a term of twenty-one years at £300 a year to tenants who covenanted to buy 100,000 gallons of tar a year from them. The premises were within 75 feet of another building and an early town planning statute, 25 Geo. III, c. 77, made it unlawful to draw oil of tar in such premises. The claim was for rent and for refusal to make the purchase, and failed. The decision is regarded as a leading authority, and I shall have more to say about it later. Other well-known cases in which landlords' claims for rent were met by pleas of immorality or illegality are *Upfill* v. *Wright* [1911] 1 K.B. 506, an action for rent against a kept woman, and *Alexander* v. *Rayson* [1936] 1 K.B. 169 (C.A.), in which the issue was raised in a way which did not commend itself to the Court of Appeal: the allegation was that the purpose of getting the tenant to execute two documents, a lease of a flat and an agreement to supply services mostly covered by the lease, was to deceive the rating authorities; the validity of the plea was upheld, but the last we are told about the case is that it was remitted to give the plaintiff an opportunity of refuting the allegation.

The estate

Many readers of the cases above mentioned must feel inclined to wonder "what happened then," out of human if not legal curiosity. For sequels there must have been; but none of the decisions deals with the question whether the taint negatived the very existence of a relationship of landlord and tenant.

Gas Light and Coke Co. v. *Turner*, if not carefully perused, is apt to be misleading on this point. For the defendant was not content to plead that the covenant for rent and that for the purchase of tar were unenforceable; he pleaded and argued that the lease was void; and, what is more, Abinger, C. B., accepted this contention: "void and cannot be enforced." But the arguments advanced for the plaintiffs had included the rather desperate one that if the claims were dismissed they would never see their property again; and it was the cautious Parke, B., who observed, in his short judgment, that whether the plaintiffs would not be entitled to recover in ejectment "forms no part of the question to be decided by the court."

The question became a vital one when *Feret* v. *Hill* (1854), 15 C.B. 207, was decided. The defendant had let premises to the plaintiff on the latter telling him (and supporting his statement with a reference) that he wanted to carry on the business of a perfumer in them; when the defendant found that they were being used for the purposes of a brothel, he took what he conceived to be the law in his own hands and ejected the plaintiff physically. His plea was that he had been induced to let by false representations and that he was justified in rescinding the contract. Quite early in the course of the argument put forward on his behalf Williams, J., made the awkward interjection: "The estate passed by the agreement. I do not see how he got it back." A good deal was, however, said on both sides; and when Jervis, C.J., delivered judgment, he said that he had been much impressed by the argument that the lease was void. Nevertheless, his conclusion was that the term had vested, the defendant knowing the effect of his executing the instrument; and Maule, J., explained the position by pointing out that the plaintiff was not calling upon the court to enforce any agreement at all, and that the defendant's remedy—if any—was to be sought in a court of equity.

But *Feret* v. *Hill* was not a case in which both parties were aware of the intended illegality at the time of the grant.

A premium

The facts of *Grace Rymer Investments, Ltd.* v. *Waite* were that the mortgagors had, before the "taking effect" of the charge, let portions of the subject-matter to three separate tenants as flats, each paying three years' rent in advance. Each submitted that he had a weekly tenancy protected by the Rent Acts. The submission was based on the fact that rent books had been handed to them acknowledging the payment of so much by way of weekly rents; in one case, it was alleged, the tenant had been told that when the

"advance term" had expired, rent would be paid weekly or by mutual arrangement: apart from that, there really was no reason for speaking of the grants as if the habendum were week-to-week.

The grantors were presumably, according to Danckwerts, J., desirous of anticipating the rents payable over a period, with the object of producing lump sums: whether in order to finance their purchase operations, or with the object of making a quick fortune and a departure with their gains.

We have long realised that the description of "premium" given by Warrington, L.J., in *King* v. *Cadogan (Earl)* [1915] 3 K.B. 485 (C.A.) ("A cash payment made to the lessor, and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained . . . the purchase-money which the tenant pays for the benefit which he gets under the lease") will not fit the expression "premium" as used in the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1) (which, incidentally, speaks of "payment of any premium in addition to the rent"). But the question whether rent in advance, which is not in itself made illegal, could constitute a premium had been referred to in *obiter dicta* only. (*Samrose Properties, Ltd.* v. *Gibbard* [1958] 1 W.L.R. 235; *ante*, p. 160 (C.A.), has added to our knowledge and will be discussed in a later "Notebook.")

In *Woods* v. *Wise* [1955] 2 Q.B. 29 (C.A.), in which a tenant claimed to recover a payment of alleged "commuted rent" because the landlord had not "required it," Romer, L.J., expressed the view that a requiring of substantially the whole of the standard rent in advance as a condition of a fourteen or twenty-one years' grant or some other term of years would be unlawful, though not every requirement of forehand rent would fall under the ban. And in *Hitchcock* v. *Waite, The Times*, 30th May, 1957, Vaisey, J., held that payment of more than standard rent in advance was payment of an unlawful premium.

The question was, Danckwerts, J., said, at what point is the line to be drawn; and the learned judge adopted a new test: If the demand is obviously a device to get over some provision of the law, and not merely a *bona fide* attempt to prevent the landlord being deprived of his ability to recover the rent, the transaction may be scrutinised and be shown to be something other than it is called. And in the circumstances before him, the payments were premiums unlawfully demanded.

Illegality

In a case in which a tenant had failed to establish an overriding interest because his payment of rent in advance was made under a contract amounting only to an executory agreement for a lease, *City Permanent Building Society* v. *Miller* [1952] Ch. 840, Hodson, L.J., said, *obiter*, that he could never have such an interest because "the exaction of a premium by the mortgagor would itself be a criminal offence, and the tenant would be a party to the crime." In *Hitchcock* v. *Waite, supra*, Vaisey, J., is reported to have said that the "tenants" concerned would be parties to a criminal offence, though no moral blame attached to them.

But one of the "tenants" in that case had obtained judgment for the recovery of part of the sum paid—this would have been by virtue of the Landlord and Tenant (Rent Control), Act, 1949, s. 2 (5). This enactment, and corresponding provisions in older Acts, enabled Danckwerts, J., to take the view that it was the act of the landlord which was forbidden and was an offence—the Acts "treated the tenant as a victim" and the tenancies concluded were not unlawful. Indeed the point had been examined in *Gray* v. *Southouse* [1949] 2 All E.R. 1019, in which a tenant recovered a premium though he had been aware of its illegality.

The learned judge did not, therefore, base his decision on the proposition that despite the illegality estates known as "terms of years absolute" (Law of Property Act, 1925, s. 1 (1) (*b*)) had vested; for which proposition there is, in my submission, ample justification to be found in the reasoning in *Feret* v. *Hill*, though there was no question of *in pari delicto* in that case. Nor is the principle, I suggest, necessarily limited to dealings with realty; if *A* hires housebreaking implements from *B*, both knowing that they are to be used for the purposes of burgling, *B* may be unable to recover the agreed sums—but the property in the implements does not vest in *A*.

R. B.

HERE AND THERE

BOARDING THE MAYFLOWER

It is only when seen through the golden haze which, for most of us, veils the land of long ago that the voyage of the original *Mayflower* seems wholly fortunate. The hitches and the disappointment, inherent in all human achievements, in living rather less than "happily ever after" must have been more in the foreground of the minds of the ship's company than the ultimate outcome of their great adventure. So, taking the thing at human scale, we should not repine overmuch if the voyage of the second *Mayflower* has not been rainbows and dancing dolphins and following winds and pieces of eight all the way, and if she has not triumphantly sailed into solvency with

> "Chest upon chest full of Spanish gold
> And a ton of plate in the middle hold
> And the cabin a riot of stuff untold."

Instead she finds herself becalmed on the waters of litigation, in the dangerous narrows of the Court of Chancery, with a boarding party of creditors attempting to scale her sides. Fortunately for her there are some boatloads of other creditors circling protectively round her and intent on repelling the boarders, who are seeking the compulsory winding up of Mayflower Projects, Ltd. But the company is not yet for the breakers' yard, despite its £60,000 worth of debts. It will be remembered that both in the initial and the concluding stages of her voyage the second *Mayflower* had to be given a tow. So with the company, its creditors provided a tow at the start when it could not get going under its own sail and now there is a lively hope that some benevolent power will tow it into harbour. In the words of counsel appearing before Mr. Justice Vaisey: "One of the major creditors of the company has made arrangements with a third party, as a result of which that third party, without assuming the company's liabilities, is, we hope and confidently expect, going to make, at any rate, an interim sum available for distribution among the company's creditors generally." So the matter has been adjourned for a month. It would be too cruel if the second *Mayflower* were to be condemned to

sail the seas of litigation like a ghostly *Flying Dutchman* until some distant Judgment Day. The third party referred to was Plymouth Plantation, the *Mayflower's* present owners, who are exhibiting her in Florida where the dollars and pieces of eight are mounting in the treasure chest for the satisfaction of the British debts.

OVER THE WATER NOW

SINCE the topic of the *Mayflower* has carried us across the Atlantic, let us take a look round at the country the Pilgrim Fathers and Mothers would find if, like their ship, they could revisit thus the glimpses of the moon. In New England they or their immediate successors indeed grew, grafted on to their solid virtues, their own particular lunacies in witch-hunting and in Sabbatarian laws of a wild fantasy never known in old England. So, grafted on to present good, they would find new and unimagined lunacies, since every age runs mad in a different direction. What would they make of some of the items of legal news which have come in lately from the United States? Some would surely savour to them of witchcraft. Take the experiment in a Californian prison of sending convicts to sleep wearing earphones which whisper "go straight" messages to them for four minutes every night. The results are reported to be good. On that account, perhaps, though mystified, they might have approved, accepting the thing as the voice of God. They would almost certainly have been interested in the "drunkometer," an instrument designed to measure the amount of alcohol in the breath of drivers suspected of being tipsy. You blow into a balloon and the moving finger shows whether you are on the right side or the wrong side of the legal standard of sobriety; or so it has been supposed. But a jury at Detroit, trying a man for drunken driving, was sceptical. Three of its members (two women and a man) took a stiff drink of whisky and blew. The machine registered them all as sober, though one of the women found that she could talk but not walk, the other wanted to go out and dance and the man, keeping his balance with difficulty, declared himself drunk, even if it did not show on the machine. So indulgent a machine would hardly have appealed to most of those stern moralists. Divorce on the scale on which it is now practised in the land which they helped to found would hardly be comprehensible to them. Nor, since they were not a pre-eminently laughing band, would some of the grounds on which divorce is granted in any way lighten the darkness of the picture. They would not be amused, though I think most of the rest of us would, at the recent divorce of a film actress in Los Angeles on the ground that her husband went out in the evenings, he said, to study for the State Bar examination, returning with alcohol in his breath and lipstick on his shirt. When she suggested a certain ambiguity in his plea of Bar studies, he left her. It's a long way and a far cry from Plymouth Rock to Los Angeles.

RICHARD ROE

RENT ACT PROBLEMS

Readers are cordially invited to submit their problems, whether on the Rent Act, 1957, or on other subjects, to the "Points in Practice" Department, "The Solicitors' Journal," Oyez House, Breams Buildings, Fetter Lane, London, E.C.4, but the following points should be noted:

1. Questions can only be accepted from registered subscribers who are practising solicitors.

2. Questions should be brief, typewritten *in duplicate*, and should be accompanied by the sender's name and address *on a separate sheet*.

3. If a postal reply is desired, a stamped addressed envelope should be enclosed.

Section 16—MINIMUM LENGTH OF TENANT'S NOTICE TO QUIT—STATUTORY TENANT HOLDING OVER AFTER TERM OF YEARS

Q. Where a tenant of a flat subject to the Rent Restrictions Acts, holding over as a statutory tenant under the terms of an expired contractual tenancy for a term of years, wishes to quit, what notice must he give to the landlord? Section 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides for a tenant in these circumstances giving not less than three months' notice. This section would not appear to have been repealed. So far as a statutory tenant's notice to quit is concerned, has it been affected by s. 16 of the Rent Act, 1957?

A. A statutory tenant holding over after the expiry of a fixed term of years must give at least three months' notice to quit under s. 15 of the 1920 Act. Section 16 of the 1957 Act will only affect the giving of notice by a statutory tenant where he is holding over after the expiry of a contractual term which he could have terminated by less than four weeks' notice, e.g., a weekly tenancy.

Schedule V—REDUCTION OF RATEABLE VALUE—TIME FOR SERVICE OF NOTICE

Q. Mr. *A* is proposing to purchase a dwelling-house and premises situate outside London, the rateable value of which on 7th November, 1956, was £32. The property includes a wooden shed used as a garage which may have been and probably was erected by the tenant, but the owners have no conclusive evidence as to this. The rateable value of the property without the garage on 7th November, 1956, would have been £29. The tenant did not apply for or serve upon the owners notice requiring reduction of the rateable value in accordance with Sched. V, Pt. III, of the Rent Act, 1957, in respect of the garage, and the owners have not entered into any agreements with the tenant as to the garage being an improvement, as to the reduction in the rateable value or otherwise. The owners have not served any notices upon the tenant under the Act or otherwise. Paragraph 11 (1) seems to indicate that the tenant must serve notice within six weeks of 6th July, 1957, requiring the owners to agree a reduction, and, while s. 12 (3) gives the court power to extend the time in which an application to the court can be made to settle questions as to whether or not the garage is an improvement, and, if so, by whom it was made, it seems that the notice under para. 11 (1) is a condition precedent to an application to the court and that now no steps can be taken by the tenant to obtain a reduction in the rateable value, and so to make his tenancy a protected tenancy under the Act. Can the rateable value for the purposes of the Rent Act, 1957, now be reduced so as to make the tenancy a protected tenancy?

A. We agree that by para. 11 (1) of Sched. V before the rateable value of premises can be decreased by reason of tenants' improvements it is a condition precedent that notice must be served on the landlord not later than six weeks after the commencement of the Act. Paragraph 12 only applies once such notice has been served. As no notice has

been served the rateable value cannot now be reduced. In our opinion the only line of approach which the tenant could take to prevent the premises being decontrolled is to argue that the garage is not in fact included in the subject-matter of the letting to him, i.e., is a tenant's fixture. The mere fact that it is rated does not preclude its being a tenant's fixture—*Kirby* v. *Hunslet Union* [1906] A.C. 43. Whether or not the garage has become attached to the realty and so a landlord's fixture will depend on the degree of and reason for the fixing or on whether there was any intention to make it part of the land.

Apportionment of Gross and Rateable Values

Q. We act for a landlord in respect of a house divided into two parts. For years past the rates have been paid equally by our client, the landlord, who occupies the ground floor, and by the tenant, who occupies the first floor. The gross rateable value of the whole house is £75 and the rateable value £60, and it is situate in Middlesex. We have been asked to serve the necessary notice of increase of rent under the Rent Act, 1957, but as a first step must obtain agreement with the tenant as to the apportionment of the gross rateable value of his part of the house. If the gross rateable value of the tenant's part be taken as one-half of the gross value of the whole house this will be £37 10s. Looking at the table of the gross and rateable values, however, we observe that a gross value of £37 10s. would represent a rateable value of less than £30, i.e., about £28. If the tenant's future rent is to be calculated with reference to this lower rateable value of £28 it will mean that the landlord is going to bear a larger share of the rates on the whole house than heretofore, i.e., rates based on £60 minus £28, which is £32. Would you agree, therefore, that if equality is intended as regards payment of rates in the future, the rateable value should first be divided, which is £60, making £30 rateable value for each part of the property? Then, from reference to the tables, since this means a gross value of £40 the agreement between the parties should be that the gross value attributable to the tenant's flat be £40.

A. In our opinion it is necessary to apportion both the gross value and the rateable value in the same ratio, and to have no regard to the table of statutory deductions. In the same way that if the gross value is apportioned first and then regard paid to the table to fix the rateable value, the landlord will bear an unfair burden of rates, so if the rateable value is apportioned first and then the table used to give the gross value relating thereto, the tenant will pay too large a rent. If it is agreed that the two flats are of equal value then the gross value should be halved and the rateable value should also be halved. That is the only way in which equality can be achieved.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal"]

"Justice"

Sir,—The English Committee of "Justice" complains that the profession's response to its appeal for support has been "very disappointing." The reasons, I suggest, are not far to seek: I briefly rehearse three that occur to me.

(1) The literature I have so far received has been couched in such nebulous terms that I, for one, failed to gather precisely what it was I was being asked to support. Nor does last week's letter help me to the light; in the midst of a chain of woolly abstractions the Committee announces its shattering discovery that "there are many problems needing attention in our colonial territories," which presents to my mind no concrete image of any description. Further, the short title of this body is "Justice," yet the main plank in its platform appears to be the promotion of "the concept of the rule of law." How does one equate "Justice" with "the rule of law," seeing that the latter may well be the negation of the former? In any event, whose law is supposed to rule?

(2) One notes that the Society "arose spontaneously through the joint action of the legal societies of the three political parties." I had no inkling of the existence of a Conservative, a Liberal and a Socialist Law Society, and regret I have not had the news, but, that apart, is this announcement intended to guarantee against political bias? Or does it suggest that, blue, pink or yellow, the "rule of law," in the hands of "an all-party organisation," is to subserve political ends? I am filled with misgiving: our own statute book is not innocent of legislation promoted for political ends; if the Committee is let loose on other countries whose legislation is in a far worse plight, what assurance have we that, instead of the enlightenment being spread, the infection will not merely be caught in epidemic measure?

(3) How, in any rational and positive sense, is my support, or that of my colleagues in private practice, going to make one iota of impression on the deliberations of this body? To what ends is our suffrage to be employed? To what does our paper support commit us? Or (unworthy thought!) is it only a matter of £1 per head, to give financial backing to yet another group of gentlemen with time on their hands and a desire to make a figure at yet another International Conference?

R. H. DOUGLAS.

Sturminster Newton,
Dorset.

Information about Cancer

Sir,—Much public interest has recently been aroused about the importance of a basic knowledge of cancer and its prevention. May I therefore ask for your goodwill to use the correspondence column of your newspaper to draw the attention of your readers to the facilities offered by the Marie Curie Memorial Foundation for such a purpose?

One of the main objects of the Foundation is to provide the public with information about cancer so that knowledge and optimism may take the place of ignorance and fear of this dread disease. This voluntary organisation has prepared a series of pamphlets for this purpose which can be obtained by application to the Secretary, Education and Welfare Sub-Committee, 124 Sloane Street, London, S.W.1 (Tel.: SLOane 1095).

T. BERNARD ROBINSON,
Secretary.

London, S.W.1.

The honour of knighthood has been conferred upon Mr. Justice GEOFFREY WALTER WRANGHAM, Mr. Justice HERBERT EDMUND DAVIES and Mr. Justice RICHARD EVERARD AUGUSTINE ELWES, O.B.E., T.D.

Mr. JOHN M. NEAL, solicitor, of Banbury, has been appointed clerk to the Banbury Borough Magistrates in succession to Mr. Claude Fortescue, senior partner of the same firm, who will be retiring on 31st March after thirty-two years in that office.

Mr. PAUL STORR has been appointed an assistant Registrar of County Courts and assistant District Registrar of Birmingham, in succession to Mr. PIFFE-PHELPS, who has been appointed Registrar of the Rochester group of County Courts.

Miss MARY ELAINE SYKES (Mrs. R. H. Browne), solicitor, of Huddersfield, is to be Mayoress of that town for 1958–59, her husband, Mr. R. H. Browne, having been appointed Mayor.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

Court of Appeal

RENT RESTRICTION: DWELLING-HOUSE REASONABLY REQUIRED FOR LANDLORD'S DAUGHTER: MOVABILITY OF OTHER TENANTS

Hardie *v.* Frediani

Lord Evershed, M.R., Parker and Sellers, L.JJ.

13th February, 1958

Appeal from Liverpool County Court.

The plaintiff, the landlord of a dwelling-house within the scope of the Rent Acts, sought to recover possession on the ground that he required it for occupation as a residence by his married daughter, who was living with him at the time. After hearing evidence as to the accommodation available for the daughter, the county court judge was satisfied that the landlord reasonably required possession, but he decided that, in all the circumstances, it was not reasonable to make the order. The judge took account of the fact that part of the landlord's house was occupied by a married couple, a Mr. and Mrs. Sedgewick, and, as it was conceded that, if they left, there would be sufficient accommodation for the daughter, he concluded that it would be more reasonable to move them than the tenant against whom possession had been sought. The landlord appealed, contending that this was not a relevant factor in considering, as required by s. 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, whether it was reasonable to make the order.

LORD EVERSHED, M.R., said that the movability of the Sedgewicks was a matter which should be taken into account in considering whether it was reasonable "in all the circumstances of the case" to make the order. The question was how much weight should be given to it, knowing that they might rely on the protection afforded by the Rent Acts. It could not be said that the judge had concluded that question adversely to the landlord without any basis of evidence and there was no ground on which the Court of Appeal could rightly interfere with his decision.

PARKER and SELLERS, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *Andrew Rankin* (*Purchase, Clark & Treadwell*, for *Rollo & Mills-Roberts*, Liverpool); *Gerson Newman* (*T. L. Hurst*, Liverpool).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] **[1 W.L.R. 318**

BARRISTER: FEES: DISALLOWANCE OF COSTS OF LEADING COUNSEL: TAXING MASTER'S DISCRETION

Gorfin *v.* Odhams Press, Ltd.

Parker and Sellers, L.JJ. 17th February, 1958

Appeal from Donovan, J., sitting in chambers.

The plaintiff claimed against the defendants damages for personal injuries sustained by him by reason of the defendants' negligence or breach of statutory duty. The defendants, admitting that they were guilty of a breach of s. 25 (1) of the Factories Act, 1937, disputed the quantum of damages, and they paid £350 into court. The plaintiff was represented before Byrne, J., who tried the action, by leading and junior counsel. The defendants were represented by junior counsel only. The judge directed that judgment should be entered for the plaintiff for £650 and costs to be taxed. The taxing master disallowed the plaintiff's costs of leading counsel. In his answer to the plaintiff's objections he stated: "Having heard long argument on this objection on the original taxation and on the hearing of this objection, I am of the opinion that the circumstances of this case did not justify the briefing of two counsel. No question of principle is involved as to the allowance or disallowance of two counsel. It is a matter entirely in the master's discretion. I . . . therefore overrule this objection." Donovan, J., having affirmed the taxing master's decision, the plaintiff appealed.

PARKER, L.J., said that although the terms of R.S.C., Ord. 65, r. 27 (41), were very wide, and in effect treated the matter before the judge in chambers as a rehearing, it was now clear in practice and on authority that the court would only interfere with the exercise of the master's discretion if it was clear that the master had gone wrong in principle. It was for this reason that matters of quantum only, where no principle was involved, were rarely, if ever, interfered with. In other matters, as indeed the question of whether there should be two counsel allowed or one counsel, it was impossible to say that there was no principle involved; and accordingly, if it could be shown that the master had erred in principle, then the court would exercise its own discretion in the matter. It was perfectly true, and he (his lordship) hoped it might continue, that it was in general proper that two counsel should be employed. There were a number of *dicta* in the cases to that effect, and as had been pointed out, the note in the White Book to Ord. 65, r. 27 (47), stated: "Two counsel usually allowed." But to say that because counsel was disallowed in any case, the master must therefore have erred in principle was a very different matter, and he (his lordship) could not say in the present case, any more than could the judge, that the master had erred in principle. The appeal would be dismissed.

SELLERS, L.J., delivered a concurring judgment. Appeal dismissed.

APPEARANCES: *John Thompson*, Q.C., and *J. G. Sheldon* (*Shaen, Roscoe & Co.*); *Peter Pain* (*C. A. Rutland*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] **[1 W.L.R. 314**

Chancery Division

WILL: BEQUEST OF BUSINESS: ASSETS AND LIABILITIES COMPRISED IN BEQUEST

***In re* White, deceased; McCann and Another *v.* Hull and Another**

Wynn Parry, J. 24th January, 1958

Adjourned summons.

By cl. 7 of his will a testator, who died in 1956, provided: "I give and bequeath the business of a house furnisher at present carried on by me at 64 Myddleton Road, Bowes Park . . . as to two-thirds to my wife Margaret absolutely and as to the other one-third to Bessie Amy Hull (in consideration of her long and faithful service) for their own use and benefit absolutely and it is my wish that the said Bessie Amy Hull shall carry on and manage the said business as she shall think fit." Then followed a residuary gift by which everything else was given to the widow, the second defendant. The executors took out this summons to ascertain, *inter alia*, whether the bequest of the business included (i) stock-in-trade; (ii) book debts amounting to £608 8s. 9½d.; (iii) the freehold property at Myddleton Road, Bowes Park; (iv) whether the bequest of the business was subject to the payment thereout: (*a*) of the testator's trade liabilities at his death amounting to £1,247 7s. 6d.; (*b*) the income tax payable in respect of the profits of the business down to the testator's death.

WYNN PARRY, J., said that cl. 7 should be so construed in relation to the available assets as to carry with the gift of the business sufficient to allow the obvious wish of the testator to be achieved, namely, that the business should be carried on. It followed that he intended that the stock-in-trade, which was then part of the business, should pass in order that the business could be carried on. By parity of reasoning, on the assumption that the testator intended the business to be carried on, the book debts were items which must be treated as having been regarded by him as part of his business assets. As to the freehold property, the evidence was that those premises throughout had been used by the testator to carry on his business. There was no reason, therefore, for excluding it from the assets of the business. The next question was whether the bequest in cl. 7 of the business subjected the assets which passed under the clause to the trade liabilities. The key to the whole problem was to be found in the latter words of cl. 7. This was a case where the business should be regarded as an entity, and where the words of Simonds, J., in *In re Rhagg* [1938] Ch. 828, at p. 836, applied: "The

substance of the bequest is the assets of the business subject to its liabilities." On its true construction, cl. 7 contemplated a continuation of the business, lock, stock and barrel, as it existed at the date of the death of the testator. Therefore the bequest was subject to the payment of the trade liabilities. Finally, as to the income tax payable in respect of the profits of the business down to the testator's death: assuming those to be confined to the amount assessed on the testator under Sched. D in respect of the profits to which he had become entitled through carrying on the business, that tax must be regarded as entirely personal to the testator and should not be paid out of the assets of the business. Declaration accordingly.

APPEARANCES: *John Monckton (Frank E. C. Ferney)*; *G. B. H. Dillon (Bailey, Breeze & Wyles)*; *B. A. Bicknell (Chatterton & Co.)*.

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] **[2 W.L.R. 464**

Queen's Bench Division

ALIEN: LANDING FROM AIRCRAFT AT APPROVED AIRPORT: FALSE IMPRISONMENT

Kuchenmeister *v.* Home Office and Another

Barry, J. 29th January, 1958

Action.

By art. 1 of the Aliens Order, 1953, an alien shall not land from an aircraft in the United Kingdom except with the leave of an immigration officer, but by art. 2 (1) (*b*) leave to land shall not be required "in the case of an alien who lands from an aircraft at an approved port for the purpose only of embarking in an aircraft at the same port, and remains, throughout the period between his landing and embarkation, within such premises or limits as may be approved for the purpose by an immigration officer." At 6 p.m. on a day in April, 1955, the plaintiff, a German national resident in the Republic of Ireland, who held a through-ticket from Amsterdam to Dublin, landed from an aircraft at London Airport (an approved port for the purposes of the Aliens Order, 1953) for the purpose only of transferring to another aircraft in which he intended to fly on to Dublin. That aircraft was scheduled to leave London Airport at 8.40 p.m. on the same day, but its departure point was some distance away from the place where the plaintiff had landed, access thereto being along a road which, though within the confines of the airport, was virtually a public road. At the material time the immigration authorities had instructions that the plaintiff was to be prohibited from landing in the United Kingdom. They did not in fact refuse him permission to land, but caused inquiries to be made about him, detaining him meanwhile in the immigration hall adjacent to the place where he had landed and from which it was impossible for him to embark on the aircraft for Dublin. Authority for him to cross the airport to the departure point for the Dublin aircraft was not obtained by the immigration officers until 2½ hours later, by which time it was too late for him to board the aircraft, which left without him. The plaintiff spent the night at the airport, there being no other aircraft for Dublin until early the following morning. In an action for damages for false imprisonment against the Home Office and the senior immigration officer at the airport, the plaintiff alleged that he had been wrongfully detained from the time that he landed until he left the following morning, and that his liberty had been restricted.

BARRY, J., said that the vital question in the case was: Assuming that the immigration officers did not put into operation their powers under art. 2 (2) of the order to grant or refuse leave to land, could they, by an exercise of their discretion as to the premises or limits within which an alien landed under art. 2 (1) (*b*) might remain, effectually defeat the purpose for which the alien in fact landed, namely, to embark in an aircraft at the same port? If they could do so, then the plaintiff had no possible ground for complaint in law. He had, however, come to the conclusion that the immigration officers could not so exercise their discretion. The plaintiff had admittedly fulfilled all but one of the obligations imposed upon him by art. 2 (1) (*b*). He landed from an aircraft, at an approved port, and as was very soon apparent to the immigration officials, for the purpose only of embarking in an aircraft at the same port. Having fulfilled those conditions the defendants were not entitled to prevent him from carrying out the purpose for which he had landed by limiting the premises or limits within which he might remain between his landing and embarkation in such a way as to render his embarkation impossible. If a requirement was placed upon an alien to remain within certain prescribed areas, it was a corollary that certain areas would in fact be prescribed, and if the immigration authorities prescribed no area at all in which he might remain, or if they prescribed an area which rendered his onward flight impossible, then they were frustrating the whole purpose of art. 2 (1) (*b*) and were acting outside the jurisdiction and discretion it conferred upon them. Accordingly, the immigration officers' purported detention of the plaintiff under the terms of art. 2 (1) (*b*)—namely, by confining the approved area to the north building—was outside their powers and illegal. It was a restriction on his liberty which the plaintiff was entitled to regard as false imprisonment and for which he was entitled to damages. No pecuniary damage had been suffered, but the right of liberty was one which must be protected. A fair figure to vindicate the plaintiff's rights would be £150. There would be judgment accordingly.

APPEARANCES: *Leslie Scarman*, Q.C., and *W. A. B. Forbes* (*Chalton Hubbard & Co.*, for *Marsh & Ferriman*, Worthing); *Sir Harry Hylton-Foster*, Q.C., S.-G., and *Rodger Winn* (*Treasury Solicitor*).

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law] **[2 W.L.R. 453**

VICARIOUS LIABILITY: INJURY TO SERVANT THROUGH NEGLIGENT DRIVING OF FELLOW SERVANT: LIMITATION: CONTRIBUTION FROM ESTATE OF DECEASED SERVANT

Harvey *v.* R. G. O'Dell, Ltd., and Another; Galway, third party

McNair, J. 18th February, 1958

Action.

On 29th February, 1952, the plaintiff, a workman employed by the defendants, a firm of builders and repairers in London, and *G*, a fellow employee, were engaged on repair work on the defendants' behalf at Hurley. *G*, who was employed as a store-keeper, owned a motor-cycle combination which he used from time to time for the defendants' business; he paid for his petrol, but when out on the defendants' business received a travel allowance based on the cost of public transport. When engaged on outside work the defendants' workmen were paid for travelling time as working time and if they were out all day and had to travel some distance to get a meal, were paid for the time taken in travelling to and from the meal place as working time. When instructed to go to Hurley, *G* had been told to take the plaintiff with him as his mate in his sidecar. It would not have been possible for *G* and the plaintiff to travel to Hurley and back by public transport and to complete the work there in one day. *G* had taken some tools from the defendants' yard with him but after he and the plaintiff had been working for some hours they went into Maidenhead, a distance of about five miles, where *G* procured further tools and materials and they both had a meal. On the way back to Hurley when the plaintiff was a passenger in the sidecar the motor-cycle combination came into collision with a car and the plaintiff received injuries and *G* was killed. The accident was due, in part at least, to the negligence of *G*. The plaintiff brought an action for damages against the defendants on the ground that the defendants were vicariously liable for *G's* negligence, in which the defendants contended that at the time of the accident neither *G* nor the plaintiff was acting in the course of his employment. On 24th May, 1952, letters of administration of the estate of *G* were granted to his widow. On 14th March, 1955, the defendants instituted third party proceedings against the widow as administratrix, claiming damages for breach by *G* of his contract of employment and also claiming contribution under s. 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935. The widow contended that the defendants' rights were barred by s. 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934, and that *G* was not a tortfeasor "who . . . would if sued have been liable" to the plaintiff within the meaning of s. 6 (1) (*c*) of the Act of 1935.

MCNAIR, J., reading his judgment, said that since *G* was instructed to take the plaintiff with him to do work on the defendants' behalf at Hurley, the defendants would be vicariously liable for *G's* negligent method of performing the journey from London to Hurley even if they had not expressly authorised the means of transport used, which they had done, unless in the

course of the journey *G* had gone outside the scope of his employment by doing something solely for his own purposes [see *Canadian Pacific Railway Co., Ltd.* v *Lockhart* [1942] A.C. 591 and *McKean* v. *Raynor Brothers, Ltd.* [1942] 2 All E.R. 650]. On the particular facts of the case the journey from Hurley to Maidenhead and back was equally within the scope of *G's* employment even had no question of tools arisen and the primary purpose of that journey had been to get a meal, for it should be regarded as fairly incidental to the work which the plaintiff and *G* had been instructed to do; accordingly there would be judgment for the plaintiff in the action. On the third party proceedings his lordship said that in *Lister* v. *Romford Ice and Cold Storage Co., Ltd.* [1957] A.C. 555, on which the defendants relied, the House of Lords was dealing only with the normal engagement of a servant to drive a motor vehicle on the road. He did not read that case as laying down a proposition of general application that whenever an employed person drove a motor vehicle in the course of his employment he impliedly agreed *vis-à-vis* his employer to take reasonable care in such driving and to indemnify him for any failure. *G* had been engaged as a storekeeper and there were no grounds for holding that by making his motor-cycle available for his employers' business on a particular occasion he should in law have impliedly agreed to indemnify them if he committed a casual act of negligence. The defendants' claim against the third party based on breach of contract failed. As to the claim for contribution under s. 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, the right to contribution between tortfeasors given by that section was a right *sui generis* and proceedings for contribution were not proceedings "in respect of a cause of action in tort" so as to be barred by s. 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934. Adopting the reasoning of Barry, J., in *Post Office* v. *Official Solicitor* [1951] 1 All E.R. 522, his lordship thought that although the cause of action for contribution under the Act of 1934 had not arisen until judgment in the action it was nevertheless by virtue of s. 1 (4) of that Act a cause of action subsisting against *G* at the time of his death within s. 1 (5). Even if that were wrong s. 1 of the Act of 1934 was not by its terms comprehensive and the claim for contribution would survive against the administratrix like any other claim not specifically dealt with by that section. The question whether there was in the phrase "who . . . would if sued have been liable" in s. 6 (1) (*c*) of the Act of 1935 any temporal connotation referring to the time at which the hypothetical action must be assumed to have been brought was debated but not decided in *George Wimpey & Co., Ltd.* v. *B.O.A.C.* [1955] A.C. 169. In his lordship's judgment the phrase contained no temporal connotation, except that it was contemplated that the hypothetical action had been instituted at some time before the claim for contribution arose, and meant who would "if sued at any time" have been held liable. His lordship was fortified in that conclusion by the judgment of Donovan, J., in *Morgan* v. *Ashmore, Benson, Pease & Co., Ltd. and Samuel Fox & Co., Ltd.* [1953] 1 W.L.R. 418. There would accordingly be judgment for the defendants against the third party. Judgment for the plaintiff in the action: judgment for the defendants in the third party proceedings.

APPEARANCES: *Gerald Gardiner*, Q.C., and *J. R. Elson Rees* (*R. I. Lewis & Co.*); *Stephen Chapman*, Q.C., and *Gordon Friend* (*J. F. Coules & Co.*); *Harold Marnham* (*William Easton & Sons*).

[Reported by Miss J. F. LAMB, Barrister-at-Law] [2 W.L.R. 473

Central Criminal Court

CRIMINAL LAW: JOINDER OF CHARGES IN ONE INDICTMENT

R. *v.* Smith and Others

Glyn-Jones, J. 25th November, 1957

Trial on indictment.

Henry Thomas Smith and Robert Semaine were jointly charged, in one indictment, with manslaughter. In a second indictment Smith and Semaine were charged with larceny and with receiving stolen property, Eugene Charles Edward Candler as an accessory after the fact to the charge of larceny and receiving stolen property, and Edward George Richardson and Charles William Richardson with receiving stolen property. The witnesses to be called by the prosecution numbered about thirty in all. They were each (with the exception of certain medical witnesses) to be called on the trial of each indictment to give the same evidence on each occasion.

GLYN-JONES, J., said that if these two indictments were to be tried separately, it would be necessary for the prosecution to call in one trial almost all the evidence which would have to be called in the other. That would be a great waste of time and money, and it would be desirable in the interests of justice and in the public interest that all the matters alleged against these defendants should be heard and disposed of in one trial. The proper course was to grant a voluntary bill of indictment against all the defendants, in which there should be included a charge of manslaughter against Smith and Semaine. That had been done, and the trial would proceed on the voluntary bill. A further question arose whether or not the provisions of s. 13 (3) of the Criminal Justice Act, 1925, applied so as to enable the depositions of those witnesses who were conditionally bound over to be read on this trial. As to that, his lordship ruled that, all the defendants having been committed for trial for the offences with which they were now charged, the depositions of the witnesses conditionally bound over might be read. Any other decision would cause a wholly unjustified waste of public time and money.

APPEARANCES: *R. E. Seaton* and *E. J. P. Cussen* (*Director of Public Prosecutions*); *R. A. Kaye* (*R. G. Freeman & Co.*); *Peter Rawlinson* (*Prothero & Prothero*); *James Burge* and *Victor Durand* (*Brian Rees & Co.*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 312

Norwich Consistory Court

ECCLESIASTICAL LAW: BURIAL: DISINTERMENT AND REINTERMENT IN COMMUNAL GRAVE

In re Parish of Caister-on-Sea

Ellison, Chancellor. 15th November, 1957

Petition for faculty.

A county council, as highway authority, sought a faculty to enable them to use certain consecrated land for the purposes of a road widening scheme, involving interference with a large number of graves in that land. Proposals were put forward for the exhumation and subsequent reinterment of some 400 human remains, most of which were identifiable. Such remains as could not be identified would be reinterred together in a communal grave.

ELLISON, Ch., said that the court had long assumed a jurisdiction to permit within its discretion the user of consecrated land for purposes such as road-widening schemes, where it was satisfied that it was necessary for public good that such user should be allowed. There was no doctrinal or other rule which said, in effect, that the dead once buried in consecrated land should for ever after take absolute priority over the compelling needs of the living; and if the court was satisfied in any case that there was a substantial need based on danger to the living, or other cogent reasons, why a road should be widened at the expense of using consecrated land, it would be its duty to grant a faculty to enable that to be done. On the question of interment in a communal grave, although communal burial might seem distasteful to some, yet that practice had long been adopted, particularly in cases of national disaster, where for one reason or another the remains had not been identifiable. The chancellor then considered the facts, and in the exercise of his discretion concluded that the petitioners had not made out a sufficient case to warrant the grant of a faculty. Faculty refused.

APPEARANCES: *D. E. H. James*, Norwich; *R. C. Killin* (*Ruddock, Middleton & Killin*, Norwich).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 309

The President of The Law Society, Mr. Ian D. Yeaman, gave a luncheon party on 4th March at 60 Carey Street, Lincoln's Inn. The guests were: the High Commissioner for Canada, Mr. Justice Upjohn, Sir Charles Cunningham, Sir John Braithwaite, Mr. M. H. B. Gilmour, Mr. R. S. Borner, Mr. C. H. Scott, Mr. J. S. Widdows and Sir Thomas Lund.

BOOKS RECEIVED

The Principles of Executorship Accounts. Third Edition. By H. A. R. J. WILSON, F.C.A., and K. S. CARMICHAEL, A.C.A. pp. xii and (with Index) 162. 1958. London: H.F.L. (Publishers), Ltd. 15s. net.

The Law of Copyright. Supplement. By J. P. EDDY, Q.C. Assisted by E. ROYDHOUSE, LL.B., of Gray's Inn, Barrister-at-Law. pp. v and 46. 1958. London: Butterworth & Co. (Publishers), Ltd. 7s. net.

Gilbart Lectures on Banking 1958. Being a series of four lectures on Risk Aspects of the Irrevocable Credit. By MAURICE MEGRAH. pp. 57. 1958. London: The Institute of Bankers. 4s. net.

Konstam's Income Tax. Twelfth Edition. Cumulative Supplement No. 5. By J. E. VINELOTT, B.A., Barrister-at-Law. pp. xviii and 87. 1958. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 10s. 6d. net.

The Sanctity of Life and the Criminal Law. By GLANVILLE WILLIAMS. pp. (with Index) 319. 1958. London: Faber and Faber, Ltd. £1 10s. net.

Aspects of Justice. By Sir CARLETON KEMP ALLEN, M.C., Q.C., Hon. D.C.L. (Glasgow), F.B.A., F.R.S.L., J.P., of Lincoln's Inn. pp. ix and (with Index) 310. 1958. London: Stevens & Sons, Ltd. £1 5s. net.

Evidence. By RUPERT CROSS, M.A., B.C.L., Solicitor. pp. lxx and (with Index) 514. 1958. London: Butterworth & Co. (Publishers), Ltd. £2 15s. net.

Williams' Law and Practice in Bankruptcy. Seventeenth Edition. By MUIR HUNTER, B.A., of Gray's Inn and the Western Circuit, Barrister-at-Law. pp. c and (with Index) 1007. 1958. London: Stevens & Sons, Ltd. £6 6s. net.

Sir James Fitzjames Stephen 1829-1894. Selden Society Lecture. By LEON RADZINOWICZ, LL.D. pp. 70. 1958. London: Bernard Quaritch. 6s. 6d. net.

"Current Law" Income Tax Acts Service [CLITAS.] Release 43: 18th February. 1958. London: Sweet & Maxwell, Ltd.; Stevens & Sons. Edinburgh: W. Green & Son.

REVIEWS

The Law and Practice of Divorce and Matrimonial Causes. Fourth Edition. By D. TOLSTOY, of Gray's Inn and the South-Eastern Circuit, Barrister-at-Law. 1958. London: Sweet and Maxwell, Ltd. £2 10s. net.

Since this book first appeared in 1946 it has grown steadily in favour with both students and practitioners. Its compact form no doubt attracts many who are repelled by the larger reference books, but these slender proportions are deceptive; the whole subject of matrimonial law is covered with great thoroughness and the air of lightness is achieved by avoiding anything more than a bald statement of the law, references to cases being relied on to provide the argument for those who want it. For the student who must cover a lot of ground in a short time such a concise and unequivocal statement is excellent, and it has its uses for the busy practitioner, but it lays traps for the unwary. An example of the danger can be seen on p. 34, where the author states that "Illegitimacy can be proved by a blood test," without further comment save a reference to a case reported in "Weekly Notes." The very short report of this case shows the narrow limits of its authority, and it would be unfortunate if the reader were to rely on Mr. Tolstoy's plain unvarnished tale on this point. Such a book as this should be read in a good library if it is to be used as an authority. It would be wrong to give the impression that this book is anything other than comprehensive and reliable, but it is necessary to stress the dangers of brevity: its advantages are too obvious to call for comment.

In addition to covering the substantive and procedural law in the Divorce Division, the text includes a section devoted to summary jurisdiction, which is short but adequate. A new chapter has been added on the alteration of separation and maintenance agreements, necessitated by the Maintenance Agreements Act, 1957. There is an appendix containing all the essential statutes and rules, and the Matrimonial Proceedings (Magistrates' Courts) Bill is reproduced in the first supplement which accompanies this edition.

It is something of a feat to have produced such a complete text-book in so small a compass—500 pages, three less than the previous edition—but it would add considerably to its value if more precedents of pleadings were included. Those which are given are so straightforward and free from the diffuseness all too commonly encountered that one hopes the author will provide more in the next edition, and that his example may be followed by other draftsmen. It is particularly pleasing to see that the author interprets, and does not follow blindly, the new Divorce Rule 4; it is surely sufficient, and certainly more elegant, to plead: "That there are children of the petitioner and the respondent now living . . ." rather than to repeat the exact words of the rule: "That there are children now living the marriage of whose parents is the subject of these proceedings." Also, Mr. Tolstoy has abandoned the quite superfluous prayer for "further and other relief," which is perpetuated in the latest edition of Rayden and is still included in many petitions.

This book will continue to hold its place as a very valuable work for students and for those who, whilst not specialising in divorce, encounter problems in their practice to which they need straightforward and easily comprehended answers. For such as these it can be recommended with confidence.

Precedents of Pleadings. Common Law and Chancery. Second Edition. By BERTRAM B. BENAS, C.B.E., B.A., LL.M., of the Northern Circuit, Barrister-at-Law, Bencher of the Middle Temple, MARY HOLT, M.A., LL.B., of Gray's Inn and the Northern Circuit, Barrister-at-Law, and JEFFREYS COLLINSON, B.C.L., M.A., of the Middle Temple and the Northern Circuit, Barrister-at-Law. 1957. London: Sweet and Maxwell, Ltd. £3 10s. net.

Solicitors in ordinary practice are not normally much concerned about the intricacies of pleading—that is a matter for counsel to puzzle out—so this new edition of Precedents will not greatly concern them. But they will find that it contains a "mixed bag" of most useful High Court pleadings covering subjects in both common law and equity. They all have the merit of being based on actual pleadings used in the course of litigation. Some time ago (101 SOL. J. 747) occasion was taken to commend the 15th edition of Odgers' Pleading and Practice by B. A. Harwood, a master of the Supreme Court. These two volumes together give the practitioner an almost complete survey of what it is necessary to know of High Court pleading and practice.

These precedents of pleadings, on the common-law side, cover subjects such as agency, bankers, defamation, landlord and tenant, master and servant, negligence, nuisance, sale of goods, solicitors, work and labour; and, on the Chancery side, such differing causes of action as account, inheritance (under the Act of 1938), fraud and mistake, mortgages, partnerships, rectification, specific performance, trusts and trustees, together with miscellaneous Chancery forms and some Palatine Court forms. An altogether useful work of reference of reliable authority.

The Law Relating to Building and Engineering Contracts. By the late W. T. CRESWELL, K.C., with a Foreword by the late ALEXANDER MACMORRAN, M.A., K.C. Sixth Edition. By D. R. PERREY, B.A. (Hons.) (Oxon.), Solicitor. 1958. London: Sir Isaac Pitman & Sons, Ltd. £1 10s. net.

This book was originally written by the late W. T. Creswell, K.C., more for the builder and architect than for the lawyer.

At the same time it did not descend to loose or inaccurate language and its material was culled from the leading and other relevant decisions of the courts, but put into as simple a form as was thought appropriate to the intended class of reader. The new edition follows the same lines.

One of the main features of the work is the inclusion of the latest standard form contract of the R.I.B.A. Secondly, although primarily concerned with the special field of building and engineering contracts, the author wisely gives in general outline much matter concerned with the general principles of contract and tort.

It would be inappropriate to be unduly critical of the exposition of legal principles in a book designed primarily for the layman. But we did expect to see the Law Reform (Enforcement of Contracts) Act, 1954, more carefully expounded so as to make clear that guarantees must still be evidenced by writing; and the statement on p. 23 regarding claims for *quantum meruit* should under (*b*) make clear that damages could be claimed in those circumstances. The question what is a "standing offer" and the cases thereon needs fuller treatment, as does the question of liquidated damages: *Dunlop* v. *New Garage* should be set out more fully, it is submitted (p. 189), and so should the principle of *Cellulose Acetate* v. *Widnes Foundry*. We do not agree that a frustrated contract is discharged "by the court" (p. 201); it is discharged by the fact of frustration. Nor will the court award any damages (even nominal) where the contract is frustrated (p. 205). There are numerous little points of this type throughout the work, but as a general guide to the architect, builder or engineer it is a useful publication.

The Law of Auctioneers' and Estate Agents' Commission. Second Edition. By DAVID NAPLEY, Solicitor. 1957. London: The Estates Gazette, Ltd. £2 2s. net.

This is the second edition of a book which was first published as long ago as 1947. In view of the astonishing informality with which most contracts are made by intending vendors of property and estate agents, it is surprising that there is comparatively little case law on the subject. Presumably the reason is that by and large estate agents are philosophical men and women who realise that it is not usually good for business to be too meticulous about collecting their commission. Solicitors, however, are sometimes asked to advise about the liability to pay or the right to receive commission and from our experience of such cases we can say that Mr. Napley has done a useful service in assembling further case law on the subject and bringing the previous edition of the book up to date.

IN WESTMINSTER AND WHITEHALL

HOUSE OF COMMONS

PROGRESS OF BILLS

Read First Time:—

Agriculture Bill [H.C.] [3rd March.

To amend the Agriculture Act, 1947, the Agricultural Holdings Act, 1948, the Agriculture (Scotland) Act, 1948, and the Agricultural Holdings (Scotland) Act, 1949; to require the landlord of an agricultural holding in certain cases to provide, repair or alter fixed equipment on the holding; to amend Part II of the Landlord and Tenant Act, 1954, as to tenancies of agricultural land excluded therefrom; to amend the Schedule to the Corn Production Acts (Repeal) Act, 1921, and section twenty-one of the Hill Farming Act, 1946; and for purposes connected with the matters aforesaid.

Public Service Vehicles (Schoolchildren) Bill [H.C.] [4th March.

To enable local authorities to grant to schoolchildren new travel concessions.

Read Second Time:—

Matrimonial Causes (Property and Maintenance) Bill [H.C.] [7th March.
Metropolitan Police Act, 1839 (Amendment) Bill [H.C.] [7th March.
National Health Service Contributions Bill [H.C.] [5th March.

Read Third Time:—

Mersey Docks and Harbour Board Bill [H.C.] [6th March.
Port of London (Superannuation) Bill [H.C.] [6th March.
Road Transport Lighting (Amendment) Bill [H.C.] [7th March.

STATUTORY INSTRUMENTS

Bodmin Water Order, 1958. (S.I. 1958 No. 288.) 5d.
British Nationality Act, 1958 (Commencement) Order, 1958. (S.I. 1958 No. 327 (C. 3).) 4d.
Carbon Disulphide (Conveyance by Road) Regulations, 1958. (S.I. 1958 No. 313.) 7d.
Cinematograph Films (Renters' Licences) (Amendment) Regulations, 1958. (S.I. 1958 No. 309.) 4d.
Fiduciary Note Issue (Extension of Period) Order, 1958. (S.I. 1958 No. 326.) 4d.
Importation of New Potatoes and Raw Vegetables Order, 1958. (S.I. 1958 No. 312.) 5d.
Import Duties (Drawback) (No. 4) Order, 1958. (S.I. 1958 No. 291.) 5d.
London–Penzance Trunk Road (Turf Street and Mount Folly, Bodmin) Order, 1958. (S.I. 1958 No. 278.) 5d.
London Traffic (40 m.p.h. Speed Limit) (No. 1) Regulations, 1958. (S.I. 1958 No. 301.) 6d.
London Traffic (Prohibition of Cycling on Footpaths) (Hemel Hempstead) Regulations, 1958. (S.I. 1958 No. 329.) 4d.
Pedestrian Crossings (Amendment) (Scotland) Regulations, 1958. (S.I. 1958 No. 310 (S. 17).) 5d.
Pedestrian Crossings (England and Wales) (Amendment) Regulations, 1958. (S.I. 1958 No. 305.) 5d.
Probation (Scotland) Amendment Rules, 1958. (S.I. 1958 No. 331 (S. 18).) 6d.
Retention of Cables Under Highways (County of Lincoln—Parts of Lindsey) (No. 1) Order, 1958. (S.I. 1958 No. 319.) 5d.
Safeguarding of Industries (Supplementary List of Synthetic Organic Chemicals, etc.) Order, 1958. (S.I. 1958 No. 292.) 5d.
Silo Subsidies (Variation) (Scotland) Scheme, 1958. (S.I. 1958 No. 300 (S. 16).) 5d.
Stopping up of Highways (City and County Borough of Birmingham) (No. 3) Order, 1958. (S.I. 1958 No. 314.) 5d.
Stopping up of Highways (City and County of Bristol) (No. 2) Order, 1958. (S.I. 1958 No. 315.) 5d.
Stopping up of Highways (County of Chester) (No. 4) Order, 1958. (S.I. 1958 No. 293.) 5d.
Stopping up of Highways (County of Chester) (No. 5) Order, 1958. (S.I. 1958 No. 294.) 5d.
Stopping up of Highways (County of Hertford) (No. 5) Order, 1958. (S.I. 1958 No. 316.) 5d.
Stopping up of Highways (County of Lancaster) (No. 6) Order, 1958. (S.I. 1958 No. 277.) 5d.
Stopping up of Highways (County of Lincoln—Parts of Lindsey) (No. 1) Order, 1958. (S.I. 1958 No. 317.) 5d.
Stopping up of Highways (City and County Borough of Plymouth) (No. 2) Order, 1958. (S.I. 1958 No. 318.) 5d.
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Traffic Signs (40 m.p.h. Speed Limit) Directions, 1958. (S.I. 1958 No. 303.) 5d.
Traffic Signs (40 m.p.h. Speed Limit) Regulations, 1958. (S.I. 1958 No. 302.) 6d.
Wart Disease of Potatoes Order, 1958. (S.I. 1958 No. 308.) 6d.
Yarmouth Naval Hospital (Appointed Day) Order, 1958. (S.I. 1958 No. 328 (C. 4).) 4d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., Oyez House, Breams Buildings, Fetter Lane, London, E.C.4. Prices stated are inclusive of postage.]

NOTES AND NEWS

Honours and Appointments

Mr. ALFRED BAILLIE RENNIE, Puisne Judge, Jamaica, has been appointed Federal Justice, the West Indies.

Miscellaneous

Out of 48 candidates who entered for The Law Society's Preliminary Examination held on 3rd February, 21 passed.

DEVELOPMENT PLAN

COUNTY BOROUGH OF BIRKENHEAD DEVELOPMENT PLAN

On 18th February, 1958, the Minister of Housing and Local Government amended the above plan. A certified copy of the plan, as amended by the Minister, has been deposited at the office of the Town Clerk, Town Hall, Birkenhead. The copy of the plan so deposited will be open for inspection free of charge by all persons interested between the hours of 9 a.m. and 12.30 p.m., and 2 p.m. and 5.30 p.m. on each weekday, and between the hours of 9 a.m. and 12 noon on Saturdays. The amendment became operative as from 26th February, 1958, but if any person aggrieved by it desires to question the validity thereof or of any provision contained therein on the ground that it is not within the powers of the Town and Country Planning Act, 1947, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the making of the amendment, he may, within six weeks from 26th February, 1958, make application to the High Court.

COMMITTEE ON CONFLICTS OF JURISDICTION AFFECTING CHILDREN

As already announced, the Lord Chancellor, after consulting the Lord Advocate and the Lord Chief Justice of Northern Ireland, has appointed a Committee to consider and report what alterations in the law and practice are desirable to avoid conflicts of jurisdiction between courts in the different parts of the United Kingdom in proceedings relating to the custody of children and to wards of court and to ensure the more effective enforcement of orders made in such proceedings outside the part of the United Kingdom in which they were made.

The Committee is prepared to receive written evidence from individuals or organisations wishing to express their views. Such evidence should be sent to the Committee Secretary at the Principal Probate Registry, Somerset House, London, W.C.2, not later than 18th April, 1958.

Regis Property Co., Ltd. v. *Dudley*

In our note of this case at p. 160, *ante*, the figure "$1\frac{2}{3}$" in the thirteenth line of Pearce, L.J.'s judgment should read "$1\frac{1}{4}$."

OBITUARY

MR. P. J. F. CHAPMAN-WALKER

Mr. Peter John Feilding Chapman-Walker, solicitor, of Half-Moon Street, London, W.1, died recently. He was admitted in 1930.

CASES REPORTED IN VOL. 102

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